

***United States Court of Appeals
for the Second Circuit***



APPENDIX

Signed

76-4062

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

POLRIER & MCLANE CORPORATION,

Appellee

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellant

ON APPEAL FROM THE DECISION OF THE UNITED STATES TAX COURT

APPENDIX

SCOTT P. CRAMPTON,
Assistant Attorney General,

GILBERT E. ANDREWS,
ROBERT A. BERNSTEIN,
JOHN G. MANNING,
Attorneys,
Tax Division,
Department of Justice,
Washington, D.C. 20530.

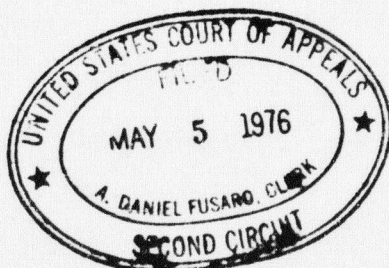


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PAGINATION AS IN ORIGINAL COPY

UNITED STATES TAX COURT GENERAL DOCKET

DOCKET NO. 2662-72

POIRIER & McLANE CORPORATION
(George R. Grant, President)
999 Nepperhan Avenue
Yonkers, New York 10703 PETITIONER.
VS.

APPEARANCES FOR PETITIONER: Dugan J. Kahan,
Edward S. St. John, Thomas P. Dougherty, (Attorneys,
Keogh & St. John, 14 Vandeventer Avenue,
11050, (St. John & Dougherty) 14 Vandeventer Avenue,
Port Washington, New York 11050

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

Date Month Day Year	Filings and Proceedings	Action	Served
Apr. 14, 1972	PETITION FILED: FEE PAID Apr. 14, 1972		Apr. 19, 1972
Apr. 14, 1972	REQUEST by petr. for trial at New York, N.Y.	GRANTED Apr. 18, 1972	Apr. 19, 1972
Jun 14, 1972	ANSWER filed by Resp		Jun 15, 1972
Nov. 14, 1973	NOTICE OF TRIAL on Feb. 19, 1974 at New York, N. Y.		Nov. 14, 1973
Feb. 21, 1974	TRIAL at New York, NY before Judge Featherston.		
	Stipulation of Facts with Exhibits attached, filed.		
	ORIGINAL BRIEFS due: April 8, 1974.		
	REPLY BRIEFS due: May 8, 1974.		
	SUBMITTED TO JUDGE FEATHERSTON.		
Mar. 22, 1974	TRANSCRIPT of Feb. 21, 1974 rec'd.		
Apr. 3, 1974	MOTION by Resp. to extend time to April 23, 1974 within which to file Brief.	GRANTED Apr. 5, 1974	APR 8 1974
April 8, 1974	BRIEF for Petr. filed.		APR 24 1974
Apr. 23, 1974	BRIEF for Resp. filed.		APR 24 1974
May 20, 1974	MOTION by Resp. to extend time to June 7, 1974 within which to file Reply Brief. (No Obj. Petr.)	GRANTED May 21, 1974	MAY 22 1974
June 6, 1974	REPLY BRIEF for Petr. filed.		JUN 10 1974
June 7, 1974	REPLY BRIEF for respondent filed.		JUN 10 1974
Sept. 3, 1974	SUPPLEMENTAL BRIEF for Respondent filed (OK per Judge)		SEP 3 1974
Sept. 3, 1974	SUPPLEMENTAL BRIEF for Petitioner filed. (OK per Judge).		SEP 3 1974

continued to pg. 2

Form No. 14
May 1970

- 2 -

(Continued from page 10)

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FILED

UNITED STATES TAX COURT 1972 APR 14 PM 12 50

FOIRIER & McLANE CORPORATION,

Petitioner,

-against-

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

UNITED STATES
TAX COURT

DOCKET NO.

2662-72

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his "Notice of Deficiency" bearing symbols, AP:NY:FBI:MNC, dated January 20, 1972, and as a basis for its case, alleges as follows:

1. The petitioner is a corporation organized under the laws of the State of New York with its principal office at 999 Nepperhan Avenue, Tonkers, New York 10703. The return for the period herein involved was filed with the District Director of Internal Revenue for the District of Lower Manhattan, New York.

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2. The Notice of Deficiency (a copy of which is attached hereto and marked "Exhibit A") was mailed to the petitioner on January 20, 1972.

3. The deficiency, as determined by the Commissioner, is in income tax for the calendar year 1964 in the amount of \$624,485.37, of which approximately the sum of \$522,273.00 is in dispute.

4. The determination of the tax set forth in said Notice of Deficiency is based upon the following error:

The Commissioner erroneously determined that a reserve for litigation costs, reported under the heading of "Job Costs," in the aggregate amount of \$1,100,000, did not constitute an allowable deduction under the accrual method of accounting and increased the taxable income for the year 1964 by \$1,100,000.

5. The facts upon which the petitioner relies as a basis of this case are as follows:

A. From the late summer and continuing through 1964, there were pending in litigation claims against the taxpayer and New York State for which the taxpayer could be liable. Taxpayer's liability

in the claims then pending against the state of New York was predicated upon its contractual obligations to the State to hold it harmless with respect to such claims. The face amount of these claims was in excess of \$14,000,000.

Acting upon sound business principles and in accordance with accepted accounting practices, taxpayer decided to, and did, set up a reserve in the sum of \$1,100,000 for litigation costs and claimed damages under Section 461 (f) 1964 Revenue Act by delivering a certificate of deposit and United States Treasury Bills, all in the total face amount of \$1,200,000, to the Manufacturers Hanover Trust Company for the sole purpose of paying the obligations of taxpayer arising out of the claims and litigation then pending against settlor. Taxpayer, as settlor, entered into an agreement, dated December 31, 1964, with Manufacturers Hanover Trust Company, as trustee, wherein and whereby settlor assigned and delivered to trustee a certificate of deposit of Manufacturers Hanover Trust Company and United States Treasury Bills in the total face amount of \$1,200,000 for the sole purpose of paying, pursuant to the provisions of such agreement, the obligations of taxpayer arising out of the litigation then pending against settlor

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and the State of New York for which settlor had agreed to hold the State of New York harmless. A copy of this agreement is annexed hereto, made a part hereof and marked "Exhibit B".

WHEREFORE the petitioner prays that this Court may try this case, determine that there is a deficiency in income tax for the calendar year 1964 in the amount of \$102,213.37, and give such other and proper relief as in the premises the Court may deem fit and proper.

/s/ Eugene J. Keogh
Eugene J. Keogh

/s/ Edward S. St. John
Edward S. St. John

/s/ Thomas P. Dougherty
Thomas P. Dougherty

Attorneys for Petitioner
HALPIN, KEOGH & ST. JOHN
630 Fifth Avenue
New York, New York 10020
212-247-4640

STATE OF NEW YORK)
 : SS:
COUNTY OF NEW YORK)

GEORGE R. GRANT, being duly sworn, says that he is the President of POIRIER & McLANE CORPORATION, the petitioner above named, and as such is duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be on information and belief, and that those he believes to be true.

/s/ George R. Grant

George R. Grant

Subscribed and sworn to before me
this 12th day of April, 1972.

DAVID W. KELLY
Notary Public, State of New York
No. 20-2070 Nassau County
Commission Expires March 30, 1973

DAVID W. KELLY
Notary Public, State of New York
No. 20-2070 Nassau County
Commission Expires March 30, 1973

P.O. Box 2954, Church St. Sta., New York, N.Y. 10008
Department of the Treasury

Regional Commissioner
Internal Revenue Service
North-Atlantic Region

Date: JAN 20 1972 In reply refer to:
AP:NY:FEM:MMC



Poirier & McLane Corporation
999 Nepperhan Avenue
Yonkers, New York 10703

Gentlemen:

Tax Year Ended	Deficiency
December 31, 1964	\$624,485.37

This letter is to notify you—as required by law—that we have determined the income tax deficiencies shown above. I regret we have been unable to reach a satisfactory agreement in your case. The enclosed statement shows how the deficiencies were computed.

If you do not intend to contest the determination in the United States Tax Court, please sign and return the enclosed waiver form. This will permit an early assessment of the deficiencies and limit the accumulation of interest. The enclosed self-addressed envelope is for your convenience.

If you decide not to sign and return the waiver, the law requires that after 90 days from the date of mailing this letter (150 days if this letter is addressed to you outside the United States and the District of Columbia) we assess and bill you for the deficiencies. However, if within the time stated you contest this determination by filing a petition with the United States Tax Court, Box 70, Washington, D.C. 20044, we may not assess any deficiency and bill you until after the Tax Court has decided your case. You may obtain a copy of the rules for filing a petition by writing to the Clerk of the Tax Court at the Court's Washington, D.C. address.

If you intend to file a petition with the United States Tax Court, you must do so within the time stated above (90 or 150 days, as the case

EXHIBIT A

Trans-21A (Rev 12/70)

may be); this period is fixed by law, and the Court cannot consider your case if your petition is filed late.

Under section 7463 of the Internal Revenue Code, the United States Tax Court has a simplified procedure for handling cases where the disputed portion of the deficiency does not exceed \$1,000 for any one taxable year. You may obtain information on this special procedure, as well as a copy of the rules for filing a petition with the Tax Court, by writing to the Clerk of the Tax Court at the Court's Washington, D.C. address.

Sincerely yours,
Johnnie M. Walters
Commissioner

By *[Signature]* J. Agar

Enclosures:
Waiver, Form 870
Statement
Envelope

Associate Chief
Appellate Branch Office

FORM 4089
(REV. MAY 1970)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

STATUTORY NOTICE STATEMENT

SYMBOLS

AP:NY:FEM:MTC

Poirier & McLane Corporation
999 Nepperhan Avenue
Yonkers, New York 10703

KIND OF TAX

Income

TAX YEAR ENDED

DEFICIENCY

December 31, 1964

\$624,485.37

☒ Copy to Authorized Representative

Eugene J. Keogh, Esq.
630 Fifth Avenue
New York, New York 10020

FORM 3613
(REV. FEBRUARY 1967)

U.S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

STATEMENT SCHEDULE

CORPORATION INCOME TAX

NAME		TAXABLE YEARS ENDED	
Poirier & McLane Corporation			December 31, 1964
TAXABLE INCOME AS SHOWN IN:			
<input type="checkbox"/> PRELIMINARY LETTER DATED		<input checked="" type="checkbox"/> RETURN AS FILED	
<input type="checkbox"/> STATUTORY NOTICE DATED			
INCREASES/DECREASES IN INCOME			
(a) Job Costs			1,100,000.00
(b) Consulting Fees			3,750.00
(c) Office Expenses			4,704.72
(d) Travel and Entertaining			3,749.81
(e) Taxes			724.45
(f) Depreciation			135,416.74
(g) Capital Gains			1,250.00
TAXABLE INCOME AS REVISED		\$	\$ 2,243,625.92
LESS: EXCESS OF NET LONG-TERM CAPITAL GAIN OVER NET SHORT-TERM CAPITAL LOSS			39,401.65
INCOME SUBJECT TO TAX		\$	\$ 2,204,224.27
PARTIAL TAX		\$	\$ 1,092,112.14
ADDITIONAL 28% OF EXCESS SHOWN ABOVE			9,850.41
SUBTOTAL		\$	\$ 1,104,962.55
OTHER (ADDITIONAL SURTAXES, CREDITS, ETC.)			
Tax from prior year investment credit			213.90
Investment credit			(43,222.50)
INCOME TAX LIABILITY		\$	\$ 1,061,953.95
INCOME TAX PREVIOUSLY ASSESSED			437,468.58
DEFICIENCY (OVERASSESSMENT)		\$	\$ 624,485.37

TAX COMPUTATION

Poirier & McLane Corporation

Statement

EXPLANATION OF ADJUSTMENTS

(a) On your return for the taxable year ended December 31, 1964 you reported, under the heading of Job Costs, a reserve for litigation costs in the aggregate amount of \$1,100,000. Since you have failed to establish that the claimed reserve constitutes an allowable deduction under the accrual method accounting, taxable income for the year 1964 is increased by \$1,100,000.

(b) Included in the deduction of \$7,795.00 claimed for consulting fees is a commission of \$7,750.00 paid in connection with the sale of Crane No. 636. This expenditure is not allowable as an ordinary expense but is allowed as an expense of sale in determining gain realized on this transaction. See adjustment (g) below.

(c) It is determined that the following expenses incurred in connection with the increase in your capital stock represent non-deductible capital expenditures:

Payment to Dept. of State of New York	\$780.00
Payment for Transfer Stamp	120.00
Total	<u>\$900.00</u>

In addition, gifts totalling \$3,804.72 which were in excess of the limitations prescribed by Section 274 of the Internal Revenue Code, are not allowed. Therefore, your taxable income is increased in the amount of \$4,704.72.

(d) The deduction of \$28,394.53 claimed for travel and entertainment expenses is not allowed to the extent of \$3,749.81 because it has not been established that any amount in excess of \$24,644.72 represents an ordinary and necessary business expense or was expended for the purposes designated. Therefore, your taxable income is increased in the amount of \$3,749.81.

(e) This adjustment is made to correct an improper accrual of New York State franchise tax.

Deduction claimed	\$53,000.00
Actual liability per State return	<u>52,275.55</u>
Decrease	<u>724.45</u>

Poirier & McLane Corporation

Statement

(f) The adjustment to depreciation is computed as follows:

Decreased depreciation allowance on
fixed assets acquired during 1964
as per Exhibit A attached

\$136,776.64

Less: Additional depreciation allowable
on expenditures capitalized as
a result of a prior income tax
examination:

1. Office furniture - Cost	\$1,787.00
Depreciation allowed 1963	55.40
Depreciable balance	<u>\$1,731.60</u>
Double declining balance - 10 year life: \$1,731.60 x 20%	\$ 347.90

2. Used light equipment - Cost	\$5,500.00
Less: 8% salvage value	<u>400.00</u>
Depreciable balance	\$5,060.00

Straight line depreciation - 5 year life
\$5,060.00 x 20%

\$1,012.00

Total additional allowance

1,359.90

Net adjustment to depreciation

\$135,416.74

(g) The net long-term capital gain of \$38,151.65 is increased by \$1,250.00
due to the following adjustments:

Loss claimed on worthless stock of
Central Aircraft Corp. is disallowed
for lack of substantiation

\$5,000.00

Gain reported on sale of Crane No. 636
is reduced by \$3,750.00, commission
paid on sale which was claimed as an
ordinary deduction

3,750.00

Increase

\$1,250.00

FORM 1914

REV. DEC. 1962

NAME OF TAXPAYER

U.S. DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE

COMPUTATION OF ALLOWABLE DEPRECIATION EXPENSE ON ITEMS CHANGED

EXHIBIT

YEAR ENDED (OR PERIOD)

Poirier & McLane Corporation

December 31, 1964

1904			KIND OF PROPERTY (If buildings, state type of construction. Ex. Acquisitions include land and other nondepreciable property)	COST OR OTHER BASIS	DEPRECIATION Claimed Per Return	REMAINING COST OR OTHER BASIS TO BE RECOVERED	METHOD	RATE (%) OF LIFE (YEARS)	DEPRECIATION ALLOWABLE THIS YEAR
a.	b.	c.							
									1/2 year allowance in year of acqui- sition

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FORM 870
(REV. JUNE 1969)
APR 1971

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE
**WAIVER OF RESTRICTIONS ON ASSESSMENT AND
COLLECTION OF DEFICIENCY IN TAX AND
ACCEPTANCE OF OVERASSESSMENT**

DATE RECEIVED BY
INTERNAL REVENUE
SERVICE

Pursuant to section 6213(d) of the Internal Revenue Code of 1954, or corresponding provisions of prior internal revenue laws, the undersigned waives the restrictions provided in section 6213(a) of the Internal Revenue Code of 1954, or corresponding provisions of prior internal revenue laws, and consents to the assessment and collection of the following deficiencies with interest as provided by law. The undersigned also accepts the following overassessments as correct:

DEFICIENCIES				
YEAR ENDED	KIND OF TAX	AMOUNT OF TAX	PENALTY	
DECEMBER 31, 1964	INCOME	\$624,485.37		
OVERASSESSMENTS				
YEAR ENDED	KIND OF TAX	AMOUNT OF TAX	PENALTY	

NAME AND ADDRESS OF TAXPAYER(S) (Number, street, city or town, State, ZIP Code)
POIRIER & HOLMES CORPORATION
999 HOPKINSON AVENUE
YONKERS, NEW YORK 10703

(The Internal Revenue Service does not require a seal on this form, but if one is used, please place it here.)

Signature(s)		DATE
		DATE
	BY	TITLE
		DATE

NOTE: The execution and filing of this waiver will expedite the adjustment of your tax liability. It is not, however, a final closing agreement under section 7121 of the Internal Revenue Code and does not preclude assertion of a further deficiency in the manner provided by law if it is later determined that additional tax is due; nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

Furthermore, execution and filing of this waiver will not preclude the taxpayer's filing under section 6511 of the Code a timely claim for refund or credit, on which (if disallowed by the Service) suit may be brought in the appropriate District Court or in U.S. Court of Claims.

If this waiver is for a year for which a JOINT RETURN was filed, it must be signed by both husband and wife unless

one, acting under a power of attorney, signs as agent for the other.

If the taxpayer is a corporation, this waiver must be signed with the corporate name followed by the signature and title of the officer(s) duly authorized to sign.

This waiver may be signed by the taxpayer's attorney or agent provided his action is specifically authorized by a power of attorney which, if not previously filed, must accompany the form.

If this waiver is signed by a person acting in a fiduciary capacity (such as executor, administrator, trustee, etc.), Form 56, "Notice of Fiduciary Relationship," should, unless previously filed, accompany this form.

EXHIBIT B

Exhibit B to the Petition, a trust agreement dated December 31, 1964, between Poirier & McLane Corporation and Manufacturers Hanover Trust Company, has been omitted because it is identical to Joint Exhibit 5-E to the Stipulation of Facts, reproduced herein at p. 30, infra.

UNITED STATES TAX COURT

POIRIER & MELANE CORPORATION,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 2662-72

[Entered June 14, 1972]

A N S W E R

THE RESPONDENT, in answer to the petition filed in the above-entitled case, admits, denies and alleges as follows:

1 and 2. Admits the allegations of paragraphs 1 and 2 of the petition.

3. Admits the deficiency, as determined by the Commissioner, is in income tax for the calendar year 1964 in the amount of \$624,485.37; denies the remaining allegations of paragraph 3 of the petition; alleges that the entire amount of the deficiency asserted is not contested by the petitioner.

4. Denies that respondent erred as alleged in paragraph 4 of the petition.

5. A. and UNNUMBERED PARAGRAPH FOLLOWING SUBPARAGRAPH A. Denies the allegations of subparagraph A and the unnumbered paragraph following subparagraph A of paragraph 5 of the petition.

6. Denies generally each and every allegation of the petition not hereinbefore specifically admitted, qualified or denied.

WHEREFORE, it is prayed that the deficiency determined by the respondent be in all respects approved.

(Sgd) LEE H. HENKEL, JR. CCMJr.

LEE H. HENKEL, JR.
~~XXXXXX~~ Chief Counsel
Internal Revenue Service

OF COUNSEL:

MARVIN E. HAGEN
Regional Counsel
RUFUS H. LEONARD, JR.
Attorney
Internal Revenue Service
26 Federal Plaza, 12th Floor
New York, New York 10007

UNITED STATES TAX COURT

POIRIER & McLANE CORPORATION,)	
)	
Petitioner,)	
)	
v.)	Docket No. 2662-72
)	
COMMISSIONER OF INTERNAL REVENUE,)	[Filed February 21, 1974]
)	
Respondent.)	

STIPULATION OF FACTS

The parties hereby stipulate and agree that for the purpose of this case the following facts and exhibits attached hereto and made a part hereof may be taken as true, subject to the rights of the parties to introduce other and further evidence not inconsistent with this stipulation and preserving the parties rights to object, at the time of trial, to any and all portions of said stipulation and attached exhibits as they may deem to be irrelevant or immaterial.

1. The petitioner was in the contracting business during the taxable year at issue, concentrating in the building of highways, viaducts and tunnels. Petitioners principal place of business was at 999 Nepperhan Avenue, Yonkers, New York on the date of the filing of the petition. The corporate income tax return for the taxable year 1964 was prepared on the accrual basis of accounting and filed with the District Director at New York, New York. A copy of this income tax return is attached hereto as Joint Exhibit 1-A.

2. The petitioner in October 1958 entered into a contract with the State of New York as general contractor for the construction of a parkway in Yonkers, New York. The petitioner was required in the contract to indemnify and hold the State of New York harmless from all suits resulting from the work under the contract.

Petitioner employed Raymond Concrete Pile Company as a sub-contractor to install the necessary pilings. During the driving of these pilings an adjacent apartment building owned by Bronxville-Palmer, Ltd. was alleged by the owners to have been damaged. In the year 1960 Bronxville-Palmer, Ltd. brought actions against the State of New York and against the petitioner and its sub-contractor, Raymond Concrete Pile Company, in which it sought damages in the amount of \$14,200,000.00, alleging negligence and trespass in that piles driven by the subcontractor trespassed upon its property and permanently damaged the foundation and the building thereon.

The reported decisions in the Bronxville-Palmer, Ltd. litigation are as follows:

224 N.Y.S. 2d. 524 (1961), 257, N.Y.S. 2d. (1965),
268 N.Y.S. 2d. 727 (1966), 277 N.Y.S. 2d. 402 (1966),
308 N.Y.S. 2d. 758 (1970), 309 N.Y.S. 2d. 672 (1970),
318 N.Y.S. 2d. 57 (1971), 318 N.Y.S. 2d. 412 (1971),
333 N.Y.S. 2d. 422 (1972).

3. In January 1956, the petitioner entered into a contract with the New York City Transit Authority to reconstruct a subway tunnel and to enlarge a subway station in the Borough of Brooklyn, of New York City. The petitioner was required in the contract to indemnify and hold the New York City Transit Authority harmless from all suits resulting from the work under the contract.

The Strand Building Corporation brought an action against the petitioner for trespass and negligence in the performance of the above contract. Actions were also brought by DeKalb Avenue Restaurant, Rose Drinks, Inc., Gavores Service Station and Glass Works and Henry A Du Flon, Jeanne Du Flon, Creed and Dorothy Du Flon Shaffer tenants of other properties located at the construction site for claimed damages and loss of revenue. The combined amount of the claimed damages by these plaintiffs was \$581,150.00.

4. The carrier of petitioner's liability insurance informed petitioner that its policies did not cover damages arising out of trespass, but that it would undertake to defend all of the above mentioned actions because of the claimed negligence. Attached as Joint Exhibits 2-B and 3-C are letters from petitioner's insurance broker and attorney explaining this position.

5. On or about December 31, 1964, the petitioner entered into an agreement with the Manufacturers Hanover Trust Company, as trustee, to hold \$1,100,000.00 for the purpose of the payment of obligations arising out of the litigation on construction contracts outlined in paragraphs two and three above. This reserve was set up by petitioner on the advice of their counsel, insurance carrier and accountants. Attached as Joint Exhibit 4-D is a copy of the letter from petitioners accountant. The \$1,100,000.00 was determined as follows:

	<u>Claim</u>	<u>Reserve</u>
Bronxville Palmer, Ltd	\$14,200,000.00	\$900,000.00
Strand Building, et al.	581,150.00	<u>200,000.00</u>
	Total	<u>\$1,100,000.00</u>

A copy of this trust agreement is attached hereto as Joint Exhibit 5-E.

Petitioner claimed this \$1,100,000.00 as a deduction for the taxable year 1964 on its income tax return under Int. Rev. Code of 1954, § 461(f). Plaintiffs in the above actions outlined in paragraphs two and three were not made parties to or notified of this trust agreement.


6. In October 1969 the petitioner notified the trustee, Manufacturers Hanover Trust Company, that all claims were disposed of and that the petitioner requested return of the \$1,100,000.00 principal of the trust plus interest earned thereon. During the life of the trust, no payments were disbursed in satisfaction of any of the claims in the above actions. The principal of the trust plus interest less trustee fees was returned to the petitioner in November 1969. A copy of two letters to Manufacturers Hanover Trust Company are attached hereto as Joint Exhibits 6-F and 7-G.

7. The monies returned by the trustee were not included in income by the petitioner on its income tax return filed for the taxable year 1969.

8. The thirty day letter was issued by the Commissioner of Internal Revenue on July 14, 1967, and petitioner filed a protest with Appellate/^{Division} on August 14, 1967, requesting conferences to review the issues. The statutory notice of deficiency was issued on January 20, 1972. By agreement between petitioner and Appellate Division, issuance of the statutory notice was delayed until the final decision was entered by the Court in the Bronxville-Palmer, Ltd. case.

9. Petitioner, due to reversals in the operation of its business, is in the process of liquidation at this time.

10. The petitioner concedes issues b, c, d, e, f and g as shown in the statutory of deficiency.



EDWARD S. ST. JOHN
Counsel for Petitioner
630 Fifth Avenue
New York, New York 10020
Tel. No. 212-CL7-4640.

MEADE WHITAKER,
Chief Counsel,
Internal Revenue Service.

By: (Sgd) THEODORE E. DAVIS - EHM
FEB 21 1974

THEODORE E. DAVIS
Assistant Regional Counsel
26 Federal Plaza, (12th Floor),
New York, New York 10007.
Tel. No. 212-264-0273.

H. C. HATH COMPANY, INC.

ESTABLISHED 1911

Insurance in All Its Branches

130 WILLIAM STREET

NEW YORK 30, N. Y.

WILLIAM 1-2644

August 12, 1964

Mr. Francis J. Jordan, President
Poirier & McLane Corporation
33 West 42nd Street
New York 36, New York

RE: Strand Theater
DeKalb Ave. Rent, Inc.,
Rose Drinks
Duffon, Grede & Shaefer

Dear Frank:

We have just completed several conferences with the Legal Department of the Hartford Accident & Indemnity Company who, as you know, are involved in defending certain portions of your legal liability and property damage claims alleged to have occurred during your DeKalb Avenue Brooklyn Subway construction operations. As you well know, you are exposed to the payment of any judgments conceivably made against you, by reason of that portion of the claim or claims for damages sustained because of indirect losses, because of inability to have access to the claimant's premises for which they may have suffered through loss of revenue.

These suits, as you know, aggregate a total of \$581,150.00. It is our considered judgment that you reserve these losses at \$200,000.00 for the reason that there has been no progress, at least to date, in dispensing these cases through settlement, and it would appear at this point, that all of these claims would go to trial. Even in the event that during trial, judgments are somewhat reduced from the alleged losses, the attorneys' fees will alone be a substantial figure.

There are several other minor cases pending such as the Cavares Service Station & Glass Works, and perhaps \$5,000.00 or \$10,000.00 would be justifiable.

Mr. Francis J. Jordan

[4-]

August 12, 1964

May we also call your attention to the Bronxville Palmer case, involving a loss of \$14,200,000.00. It is our understanding that there has been some similar litigation, we believe involving, particularly, the Raymond Concrete Pile Company. There is a theory in law, whereby inadvertently driving piles instead of 100% vertically, they are driven at a slight angle, by which they invade adjacent properties. This is the allegation in your case, that the contractor be held for the damage to such adjacent property or properties.

Accordingly, may we suggest that you again review this case with your attorneys with the view in mind that you adequately reserve this contingent liability, and conceivably be prepared to meet adverse judgment rendered against you.

Should you further desire an overall conference with your insurance carrier's Legal Department, we shall be more than pleased to arrange such a meeting with your attorneys and your designated representative.

Very truly yours,

H. C. HAUTH COMPANY, Inc.

HERBERT C. HAUTH

HCH:hm

Malpino, Hoogh & St. John

John F. Malpino 1931

Stephen J. Hoogh

Edward L. St. John

Stephen Muller

Charles J. Quinn

John C. Quinn

David W. Kelly

Thomas P. Dougherty

Frank A. Carbone

*30 Rockefeller Plaza
New York, N.Y. 10020*

Circle 7-4640

December 7, 1964

Mr. Francis J. Jordan
Poirier & McLane Corporation
33 West 42nd Street
New York, New York, 10036

Re: Bronxville Palmer, Ltd.
Strand Theatre
DeKalb Avenue Restaurant, Inc.
Rose Drinks, Inc.
Duffon, Grady & Schooner

Dear Frank:

I have reviewed the actions now pending against you in which claims have been made for both negligence and trespass. The largest of these is the Bronxville Palmer claim arising out of the construction of the Sprain Brook Parkway. In this matter there are two lawsuits pending, one in the Court of Claims against the State of New York, and the other in the Supreme Court, Westchester County, against Poirier & McLane Corporation and Raymond. As you know, the insurance company is not responsible for damages arising out of trespass, but it has undertaken to defend all of the actions because there is a claim of negligence and a possibility that all of the consequences arose out of carelessness or inadvertence on the part of your field supervisors.

It is difficult to predict the outcome although I have expressed the opinion that our superintendent and engineer should have been conscious of the fact that there would be a penetration of the adjacent land if they considered the limits of the land to which the State had access, the point of entry of the batter piles and the ratio.

Joint Exhibit

Mr. Francis J. Jordan

[-2-]

December 7, 1964

Be that as it may, we are being sued for \$14,200,000. When this matter comes to trial, there will be an attempt at settlement with contributions asked from the State, Raymond, the insurance company and you. Recently counsel engaged by the insurance company made an application to the Supreme Court, Westchester County to have the Supreme Court action removed from the trial calendar until such time as the action against the State of New York in the Court of Claims has been determined. In the Court of Claims the owner of the adjacent property is seeking from the State of New York the same damages for the same alleged cause of action as it is seeking from you and Raymond in the Supreme Court. I believe that you should have a contingency reserve set up against your possible liability even if the matter is determined in the Court of Claims. The State of New York has contractual rights against you in the contract because among other things you agreed to furnish insurance to the State to cover its liability and if Hartford disclaims, you have not complied with your contract because if there is a disclaimer there is no insurance. How much this reserve should be is speculative but based on experience in settlement negotiations and being familiar with the facts I would suggest a reserve of between \$900,000. and \$1,000,000.

The other matters mentioned in the caption arise out of the DeKalb Avenue reconstruction. The total demand in these cases is \$900,150. The claim of the Strand Theatre will come on for trial probably before the end of the December term. I suggest that for all of the claims arising out of the DeKalb Avenue reconstruction you allocate the sum of \$200,000.

Very truly yours,
JOHN E. QUINN

JEQ:dfe

A.A. RAPPAPORT & CO.

CERTIFIED PUBLIC ACCOUNTANTS

ONE EAST 42ND STREET

NEW YORK, N.Y. 10017

(R) YUON 8-4368

December 8, 1964

Mr. Francis J. Jordan
Poirier & McLane Corp.
33 West 42nd Street
New York, New York 10036

Re: Reserves for Litigation Claims

Dear Sir:

Your legal representatives, Halpin, Koogh and St. John, have informed me of certain lawsuits now pending against Poirier & McLane Corp. which are substantial in nature and would have a material effect upon your financial position if asserted against the corporation at this time. We would recommend, therefore, that you increase the reserve for litigation in connection with the Bronxville Palmer Ltd. lawsuit to \$900,000.00 and re the Strand Theatre lawsuit to \$200,000.00 to properly reflect these liabilities.

Under Section 461(F) 1964 Revenue Act the Treasury Department allows a deduction for an "asserted liability" in the year of payment even though the taxpayer is contesting liability. The final regulations specify that payment to an escrowee or trustee shall be made either pursuant to a "written agreement" or pursuant to an order of a governmental body or a court, with instructions that the money (or property) be delivered in accordance with the settlement of the contest.

The minutes of Poirier & McLane Corp. should, therefore, contain a statement by the Board of Directors agreeing to setting up this litigation reserve for \$1,100,000.00. It is also suggested that a local bank be appointed Escrowee Agent of \$1,100,000.00 in U.S. Treasury Bills with instructions to deliver these or their equivalent in accordance with settlement of lawsuits, namely, Bronxville Palmer Ltd., Strand Theatre, DeKalb Ave. Restaurant Inc., Rose Drinks Inc. and Duflon, Crede & Schaefer.

Yours very truly,

A.A. Rappaport
A.A. RAPPAPORT

AAR:ER

Mrs. John Quinn

Joint Exhibit

TRUST AGREEMENT made this 31st day of December, 1964 between POIRIER & McLANE CORPORATION, hereinafter called the Settlor and MANUFACTURERS HANOVER TRUST COMPANY, hereinafter called the Trustee.

1. The Settlor hereby assigns and delivers to the Trustee the property described in Schedule A attached hereto and made a part of this agreement, the receipt of which is acknowledged in trust, to hold, manage, control, invest and reinvest the same in United States Treasury Bills with a maturity of not less than ninety (90) days. Any interest or earnings on the deposited property are to remain in the account until the termination of this agreement and the final distribution of the fund and are to be reinvested to the extent possible.

2. The principal and all accumulated interest and earnings shall be held by the Trustee for the sole purpose of the payment of the obligations of the Settlor which may arise out of litigation pending against the Settlor as a result of work performed by it in the construction of the Sprainbrook Parkway in the County of Westchester, State of New York and in the DeKalb Avenue subway reconstruction in the Borough of Brooklyn, County of Kings wherein judgments are demanded against the Settlor and others for damages alleged to have been sustained by the owners and operators of properties adjacent to the places at which the work was performed. The claims and suits to which this agreement refers are those brought against POIRIER & McLANE CORPORATION by BROOKVILLE PALMER, LTD., STRAND BUILDING CORPORATION, DEKALB AVENUE RESTURANT, INC., ROSE DRINKS, INC., CAVARES SERVICE STATION & GLASS WORKS and HENRY A. DuFLOU, JEANNE DuFLOU CREED & DOROTHY DuFLOU SHAFFER. [Joint Exhibit 5-E]

3. The Trustee shall make such payments out of the corpus of the trust as are required to satisfy and discharge the obligation and responsibility of the Settlor to the plaintiffs or claimants in such litigation, whether by settlement or by judgment and to obtain funds for such purpose the Trustee may sell securities invested in accordance with Paragraph 1. hercof.

4. A request by the Settlor for the issuance of a check or checks payable to a plaintiff or claimant shall be sufficient to empower the Trustee to make the payment.

5. The Trustee shall deliver to the Settlor the balance of the fund remaining after the disposition of the claims on the statement of the Settlor that the claims, for the satisfaction of which this transfer has been made, have been determined and disposed of.

6. The Trustee undertakes to perform only such duties as are expressly set forth herein.

7. The Trustee may rely and shall be protected in acting or refraining from acting upon any written notice, instruction or request furnished to it hereunder and believed by it to be genuine and to have been signed or presented by the suitor.

8. The Trustee shall not be liable for any action taken by it in good faith and believed by it to be authorized or within the rights or powers conferred upon it by this Agreement, and may consult with counsel of its own choice and shall have full and complete authorization and protection for any action taken or suffered by it hereunder in good faith and in accordance with the opinion of such counsel.

9. The Trustee may resign and be discharged from its duties or obligations hereunder by giving notice in writing of such resignation specifying a date when such resignation shall take effect.

10. The Settlor hereby agrees to pay the Trustee reasonable compensation for the services to be rendered hereunder and will pay or reimburse the Trustee upon request for all expenses, disbursements and advances, including reasonable attorneys' fees, incurred or made by it in connection with carrying out its duties hereunder.

11. The Settlor hereby agrees to indemnify the Trustee for, and to hold it harmless against any loss, liability or expense incurred without negligence or bad faith on the part of the Trustee, arising out of or in connection with its entering into this Agreement and carrying out its duties hereunder, including the costs and expenses of defending itself against any claim of liability in the premises.

12. All notices and communications hereunder shall be in writing and shall be deemed to be duly given if sent by registered mail, return receipt requested, as follows:

POIRIER & McLANE CORPORATION
33 West 42nd Street
New York, New York

MANUFACTURERS HANOVER TRUST COMPANY
40 Wall Street
New York, New York, 10015
Attention: Corporate Trust Department,

or at such other address as any of the above may have furnished to the other parties in writing by registered mail, return receipt requested.

13. This trust has been executed and delivered pursuant to the provisions of Section 461-f of the 1964 Revenue Act, in the State of New York and it shall be governed by the laws of that state.

IN WITNESS WHEREOF the Settlor and the Trustee have signed, sealed and acknowledged this agreement.

POIRIER & McLANE CORPORATION

By F. J. Jordan
Pres

MANUFACTURERS HANOVER TRUST COMPANY

By William Benzinger
Assistant Trust Officer.

SCHEDULE A TO AGREEMENT BETWEEN
FOIRIER & McLANE CORPORATION and
MANUFACTURERS HANOVER TRUST COMPANY
DATED DECEMBER 31, 1964

1. CERTIFICATE OF DEPOSIT in the amount of \$500,000.00 issued by Manufacturers Hanover Trust Company, dated December 17, 1964 for a period of 180 days.
2. UNITED STATES TREASURY BILL No. 5734540, due June 30, 1965 in the face value of \$100,000.00.
3. UNITED STATES TREASURY BILL No. 5734541, due June 30, 1965 in the face value of \$100,000.00.
4. UNITED STATES TREASURY BILL No. 5735070, due June 30, 1965 in the face value of \$100,000.00.
5. UNITED STATES TREASURY BILL No. 5735546, due June 30, 1965 in the face value of \$100,000.00.
6. UNITED STATES TREASURY BILL No. 5735776, due June 30, 1965 in the face value of \$100,000.00.
7. UNITED STATES TREASURY BILL No. 5735832, due June 30, 1965 in the face value of \$100,000.00.
8. UNITED STATES TREASURY BILL No. 5735839, due June 30, 1965 in the face value of \$100,000.00.

POIRIER & McLANE CORPORATION

ENGINEERS - CONTRACTORS

COPY

999 NEPPERHAN AVENUE

YONKERS, N.Y. 10703

October 24, 1969

Mr. Everett M. Schleicher
Assistant Trust Officer
Manufacturers Hanover Trust Company
40 Wall Street
New York, New York 10015

Re: SE-6729

Dear Mr. Schleicher:

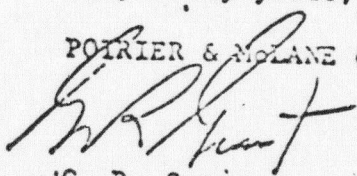
On December 31, 1964 Poirier & McLane Corporation and Manufacturers Hanover Trust Company entered into a trust agreement whereby securities enumerated in Schedule A of the agreement were deposited by Poirier & McLane Corporation with Manufacturers Hanover Trust Company for the purposes set forth in Paragraph 2 of the said agreement. The purpose of the agreement and the deposit was to provide a sum for the payment of obligations of Poirier & McLane Corporation which might arise out of litigation pending as the result of construction work performed on the Sprain Brook Parkway, Westchester County, New York and the DeKalb Avenue Subway Reconstruction, Borough of Brooklyn, New York. The claims and suits to which the agreement and deposit applied are enumerated in the said Paragraph 2 of the agreement.

All of the claims and suits enumerated in Paragraph 2 which were instituted against Poirier & McLane Corporation by Bronxville Palmer, Ltd., Strand Building Corporation, DeKalb Avenue Restaurant, Inc., Rose Drinks, Inc., Gavares Service Station & Works and Henry A. DuFlon, Jeanne DuFlon Creed and Dorothy DuFlon Shaffer have been disposed of by final judgment or by compromise and settlement and Poirier & McLane Corporation is no longer obligated to any of the said parties for any sum by reason of the construction of Sprain Brook Parkway or the DeKalb Avenue Subway Reconstruction or for any other reason whatsoever.

Pursuant to Paragraph 5 of the aforementioned agreement Poirier & McLane Corporation requests that the fund held by Manufacturers Hanover Trust Company be delivered to it and that the trust agreement be terminated by the parties.

Very truly yours,

POIRIER & McLANE CORPORATION


G. R. Grant
President

em

Joint Exhibit
6-F

October 24, 1969

Mr. Everett M. Schleicher
Assistant Trust Officer
Manufacturers Hanover Trust Company
40 Wall Street
New York, New York 10015

Re: SE-6729

Dear Mr. Schleicher:

We are the attorneys for Poirier & McLane Corporation and were its attorneys in December of 1964 when the trust agreement relative to the deposit of funds as a contingent reserve was entered into. We are familiar with the claims of the persons and corporations mentioned in the agreement and have been associated with counsel for the liability insurance company which insured Poirier & McLane Corporation during its operations at the Sprainbrook Parkway, Westchester County, New York and the DeKalb Avenue Reconstruction in Brooklyn, New York. All of the claims and law suits instituted against Poirier & McLane Corporation by Bronxville Palmer, Ltd., Strand Building Corporation, DeKalb Avenue Restaurant, Inc., Rose Drinks, Inc., Cavares Service Station & Glass Works and Henry A. DuFlon, Joanne DuFlon Creed and Dorothy DuFlon Shaffer have been terminated by final judgment or by compromise and settlement and none of these parties has any present claim against Poirier & McLane Corporation for damages arising out of the construction of the Sprainbrook Parkway or of the DeKalb Avenue Reconstruction or for any other cause of action whatsoever.

Very truly yours,

HALPERN, KEOGH & ST. JOHN

By: JOHN E. GUINN

JEQ:NC

Joint Exhibit

7-G

63 T. C. No. 55

UNITED STATES TAX COURT

POIRIER & McLANE CORPORATION, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 2662-72.

Filed March 10, 1975.

Suits were filed against petitioner for damages totaling \$14,781,150 allegedly resulting from trespass and negligence claimed to have been committed in carrying out two construction jobs. Petitioner contested the claims but, on Dec. 31, 1964, transferred \$1,100,000 in trust for the sole purpose of the payment of its obligations on the pending claims, taking a deduction for that amount on its 1964 return. Judgments ultimately awarded to the claimants were small in amount, eliminating the need for the funds transferred to the trust, and the transferred funds were returned to petitioner.

[- 2 -]

Held: The \$1,100,000 was transferred to the trustee in accordance with sec. 461(f), I.R.C. 1954, and is deductible in computing petitioner's income tax liability for 1964.

Edward S. St. John and Thomas P. Dougherty, for the petitioner.

Rufus H. Leonard, Jr., for the respondent.

OPINION

FEATHERSTON, Judge: Respondent determined a deficiency in petitioner's Federal income tax for 1964 in the amount of \$624,485.37. Some of the issues have been settled, and the sole issue remaining for decision is whether petitioner is entitled to a deduction for 1964 under section 461(f)^{1/} for the amount of funds transferred in trust under an instrument reciting that the sole purpose of the transfer was to provide funds for the payment of certain obligations

^{1/}

All section references are to the Internal Revenue Code of 1954, as in effect during the tax year in issue, unless otherwise noted.

[- 3 -]

as finally determined in pending litigation. The answer depends, more specifically, upon (1) whether the funds were placed beyond petitioner's control pending the settlement of the claims, and (2) whether the trust instrument was defective in that it was not signed by the persons asserting liability against petitioner.

All the facts are stipulated.

During the tax year in issue, petitioner Poirier & McLane Corporation (hereinafter petitioner), whose principal offices were located in Yonkers, New York, was a New York corporation engaged in the building of highways, viaducts, and tunnels. Petitioner prepared its income tax returns on the basis of the calendar year, employing the accrual method of accounting.

In January 1956, petitioner entered into a contract with the New York City Transit Authority to reconstruct a subway tunnel and to enlarge a subway station in the Borough of Brooklyn, New York City. Under the contract, petitioner was obligated to hold the New York City Transit Authority harmless from all damage claims resulting from the work to be performed.

[- 4 -]

As a result of petitioner's performance of the work on this project, the Strand Building Corporation brought an action against petitioner for trespass and negligence. Actions for claimed damages and loss of revenue also were brought by several tenants of other properties located at the construction site. The combined amount of the damages claimed by these plaintiffs was \$581,150.

In October 1958, petitioner entered into a contract with the State of New York as general contractor for the construction of a parkway in Yonkers, New York. Under this contract, petitioner was required to hold the State of New York harmless from all damage claims resulting from the work performed under the contract. To install the necessary pilings, petitioner employed Raymond Concrete Pile Company (Raymond) as a subcontractor. Subsequently, during the driving of these pilings, an adjacent apartment building owned by Bronxville-Palmer, Ltd. (Bronxville), was alleged by Bronxville to have been damaged. In 1960, Bronxville brought actions against the State of New York, petitioner, and Raymond, seeking damages of \$14,200,000

[- 5 -]

for trespass and negligence allegedly arising from pile drivings which trespassed upon Bronxville's property, thereby permanently damaging the foundation and structure.^{2/}

The carrier of petitioner's liability insurance informed petitioner that its policies did not cover damages arising out of trespass, but that the carrier would undertake to defend all the above-mentioned actions because of the allegations of negligence.

On December 31, 1964, petitioner entered into an agreement, described below, with the Manufacturers Hanover Trust Company, as trustee, to hold United States Treasury Bills and a certificate of deposit for the purpose of the payment of obligations expected to arise out of the litigation outlined above. Establishment of the reserve was prompted by advice given petitioner by its counsel, insurance carrier, and accountant.

2/

Pertinent reported decisions in the Bronxville litigation include: 224 N.Y.S.2d 524 (1961); 268 N.Y.S.2d 727 (1966); 277 N.Y.S.2d 402 (1966); 309 N.Y.S.2d 672 (1970); 318 N.Y.S.2d 57 (1971); 318 N.Y.S.2d 412 (1971); and 333 N.Y.S.2d 422 (1972).

The amount of the reserve was determined as follows:

<u>Plaintiff</u>	<u>Amount of Claim</u>	<u>Amount of Reserve</u>
Strand Building Corporation, et al.	\$ 581,150	\$ 200,000
Bronxville	14,200,000	<u>900,000</u>
	Total	\$1,100,000

Petitioner's agreement of December 31, 1964, with the trustee stated that petitioner, designated as settlor, had transferred a certificate of deposit and treasury bills to the trustee to be held in trust "for the sole purpose" of the payment of petitioner's obligations expected to arise out of the litigation pending against petitioner as a result of the two construction jobs. The agreement listed by name the corporations and individuals who had filed the suits to which the agreement referred. The agreement provided in pertinent part:

[- 7 -]

2. The principal and all accumulated interest and earnings shall be held by the Trustee for the sole purpose of the payment of the obligations of the Settlor which may arise out of litigation pending against the Settlor as a result of work performed by it in the construction of the Sprainbrook Parkway in the County of Westchester, State of New York and in the DeKalb Avenue subway reconstruction in the Borough of Brooklyn, County of Kings wherein judgments are demanded against the Settlor and others for damages alleged to have been sustained by the owners and operators of properties adjacent to the places at which the work was performed. The claims and suits to which this agreement refers are those brought against POIRIER & McLANE CORPORATION by BRONXVILLE PALMER, LTD., STRAND BUILDING CORPORATION, DeKALB AVENUE RESTUARANT [sic], INC., ROSE DRINKS, INC., GAVARES SERVICE STATION & GLASS WORKS and HENRY A. DuFLON, JEANNE DuFLON CREED & DOROTHY DuFLON SHAFFER.

3. The Trustee shall make such payments out of the corpus of the trust as are required to satisfy and discharge the obligation and responsibility of the Settlor to the plaintiffs or claimants in such litigation, whether by settlement or by judgment and to obtain funds for such purpose the Trustee may sell securities invested in accordance with Paragraph 1. hereof.

4. A request by the Settlor for the issuance of a check or checks payable to a plaintiff or claimant shall be sufficient to empower the Trustee to make the payment.

5. The Trustee shall deliver to the Settlor the balance of the fund remaining after the disposition of the claims on the statement of the Settlor that the claims, for the satisfaction of which this transfer has been made, have been determined and disposed of.

[- 8 -]

* * * * *

7. The Trustee may rely and shall be protected in acting or refraining from acting upon any written notice, instruction or request furnished to it hereunder and believed by it to be genuine and to have been signed or presented by the suitor.

8. The Trustee shall not be liable for any action taken by it in good faith and believed by it to be authorized or within the rights or powers conferred upon it by this Agreement, and may consult with counsel of its own choice and shall have full and complete authorization and protection for any action taken or suffered by it hereunder in good faith and in accordance with the opinion of such counsel.

* * * * *

13. This trust has been executed and delivered pursuant to the provisions of Section 461-f of the 1964 Revenue Act, in the State of New York and it shall be governed by the laws of that state.

The trust agreement was not signed by the claimants mentioned in it. Relying on section 461(f), petitioner deducted on its income tax return for 1964 the amount of the funds transferred to the trustee.

The litigation brought by Bronxville, which included numerous claims, commenced in 1960. On

[- 9 -]

September 8, 1969, after trial of the claims, the New York State Court of Claims awarded damages to the plaintiff in the sum of \$11,600, plus interest, for negligence on the part of the State.^{3/} This amount was apparently covered by petitioner's insurance against negligence.

In October 1969, petitioner and its counsel notified the trustee that all claims referred to in the trust agreement were disposed of and that none of the plaintiffs had any present claim against petitioner for damages arising out of the two projects or for any other cause of action whatsoever. Petitioner requested

^{3/} Subsequently, the Sept. 8, 1969, judgment of the New York State Court of Claims was modified on questions relating to suspension of interest (309 N.Y.S.2d 672 (1970), 333 N.Y.S.2d 422 (1972)), tolling of the statute of limitations (318 N.Y.S.2d 412 (1971)), and the measure of damages (318 N.Y.S.2d 57 (1971)). As a result of the last-mentioned action, the New York State Supreme Court, Appellate Division, increased the award of damages to Bronxville from \$11,600 to \$14,204.36 on Feb. 10, 1971. While litigation technically continued after Sept. 8, 1969, the essential merits of the claims were resolved on that date. Moreover, the primary reason for establishing the reserve had been to provide funds to cover possible obligations arising under claims for trespass, a cause of action for which petitioner was not insured.

return of the trust principal, plus any interest earned. The full amount of the principal of the trust, plus interest, less trustee fees, was returned to petitioner in November 1969. These amounts were not included in petitioner's income on its 1969 income tax return.

Respondent disallowed petitioner's accrual of the reserve transferred to the trustee, determining that the accrual failed to comply with section 461(a)^{4/} and, alternatively, that petitioner's transfer did not meet the requirements of section 461(f).

Under the accrual method of accounting, which petitioner used, an expense is deductible for the taxable year in which "all the events have occurred which determine the fact of the liability and the amount thereof can be determined with reasonable accuracy."

4/

SEC. 461. GENERAL RULE FOR TAXABLE YEAR OF DEDUCTION.

(a) General Rule.--The amount of any deduction or credit allowed by this subtitle shall be taken for the taxable year which is the proper taxable year under the method of accounting used in computing taxable income.

[- 11 -]

Sec. 1.461-1(a)(2), Income Tax Regs.; Dixie Pine Co. v. Commissioner, 320 U.S. 516 (1944). Notwithstanding this rule, however, the Internal Revenue Service generally took the position, prior to 1961, that the payment of a contested liability resulted in the item being considered deductible even though it was still contested. In 1961, the Supreme Court decided United States v. Consolidated Edison Co., 366 U.S. 380 (1961), holding that a contested tax, though paid, does not accrue as a deduction for income tax purposes until the contest is terminated. The Court reasoned that, as long as the contest persists, all events determining the fact and amount of the liability have not occurred.

The effect of the Consolidated Edison decision, denying a taxpayer a deduction for contested items that have been paid, was to thwart the objective of matching receipts and disbursements attributable to specific taxable years. Believing that "allowing the deduction of items in the year paid, even though they are still being contested in the courts or otherwise, more realistically matches these deductions up with the

[- 12 -]

income to which they relate than would the postponement of the deduction * * * until the contest is settled," S. Rept. No. 830, 88th Cong., 2d Sess. (1964), 1964-1 (Part 2) C.B. 505, 604, Congress adopted section 461(f) in 1964, which is as follows:

(f) Contested Liabilities.--If--

(1) the taxpayer contests an asserted liability,

(2) the taxpayer transfers money or other property to provide for the satisfaction of the asserted liability,

(3) the contest with respect to the asserted liability exists after the time of the transfer, and

(4) but for the fact that the asserted liability is contested, a deduction would be allowed for the taxable year of the transfer (or for an earlier taxable year),

then the deduction shall be allowed for the taxable year of the transfer. This subsection shall not apply in respect of the deduction for income, war profits, and excess profits taxes imposed by the authority of any foreign country or possession of the United States.

Although Consolidated Edison dealt with disputed tax liabilities, it will be noted that section 461(f) refers to any asserted liability. Moreover, the section

deals not only with liabilities which have been paid but also with the transfer of money or other property "to provide for the satisfaction of the asserted liability." The accompanying Senate Report (S. Rept. No. 830 (Part 2), 88th Cong., 2d Sess. (1964), 1964-1 (Part 2) C.B. 700, 746) explains that: "A taxpayer may provide for the satisfaction of an asserted liability by transferring money or other property to the person who is asserting the liability, or by a transfer to an escrow agent provided that the money or other property is beyond the control of the taxpayer." The objective was to allow deductions for sums transferred to pay such asserted liabilities in the year in which the related income was earned rather than in some later year when the contest over such liabilities was settled--"to realistically and practically match receipts and disbursements attributable to specific taxable years." S. Rept. No. 830, 88th Cong., 2d Sess. (1964), 1964-1 (Part 2) C.B. 505, 604.

In the instant case, petitioner was contesting the suits of various claimants and, on the advice of counsel, transferred \$1,100,000 to the Manufacturers Hanover Trust Company to be held in trust "for the

[- 14 -]

sole purpose" of the payment of any obligations ultimately determined in those suits. The trustee was authorized to make such payments to the designated claimants out of the corpus as were required to satisfy the obligations of petitioner and, "after the disposition of the claims," to return the balance to petitioner. As the subsequent events unfolded, petitioner successfully defended the lawsuits. All the money was returned to petitioner in 1969,^{5/} but there is no question as to the bona fides of the claims against petitioner or the transfer to the trustee. Indeed, the parties have stipulated that the \$1,100,000 "reserve was set up by petitioner on the advice of * * * [its] counsel, insurance carrier and accountants." We think these facts demonstrate that the transfer meets the requirements of section 461(f).

Respondent contends that the entrusted funds were not transferred "beyond the control" of petitioner and

^{5/}

Although the amount returned to petitioner was not reported as income on its 1969 income tax return, as contemplated by sec. 1.461-2(a)(3), Income Tax Regs., petitioner agrees on brief that, upon a resolution of this issue in its favor, it will file an amended return reporting it as income in that year.

[- 15 -]

that the transfer, therefore, does not meet the requirements of section 461(f) as amplified by section 1.461-2(c)(1), Income Tax Regs.^{6/} In support of this

6/

Sec. 1.461-2 Timing of deductions in certain cases where asserted liabilities are contested.

(c) Transfer to provide for the satisfaction of an asserted liability--(1) In general. A taxpayer may provide for the satisfaction of an asserted liability by transferring money or other property beyond his control (i) to the person who is asserting the liability, (ii) to an escrowee or trustee pursuant to a written agreement (among the escrowee or trustee, the taxpayer, and the person who is asserting the liability) that the money or other property be delivered in accordance with the settlement of the contest, or (iii) to an escrowee or trustee pursuant to an order of the United States, any State or political subdivision thereof, or any agency or instrumentality of the foregoing, or a court that the money or other property be delivered in accordance with the settlement of the contest. A taxpayer may also provide for the satisfaction of an asserted liability by transferring money or other property beyond his control to a court with jurisdiction over the contest. Purchasing a bond to guarantee payment of the asserted liability, an entry on the taxpayer's books of account, and a transfer to an account which is within the control of the taxpayer are not transfers to provide for the satisfaction of an asserted liability. In order for money or other property to be beyond the control of a taxpayer, the taxpayer must relinquish all authority over such money or other property.

[- 16 -]

argument, respondent argues that the paragraphs of the trust agreement quoted above reserved to petitioner "the right to revoke or terminate this trust at will" by "means of a mere statement that these claims had been determined and disposed of." He reads the above-quoted paragraph 7 of the agreement as relieving the trustee "of any obligation to look behind the contents of the statement submitted by the settlor." On this ground, respondent maintains that petitioner remained the absolute owner of the entrusted funds so far as the rights of creditors are concerned, citing City Bank Farmers Trust Co. v. Cannon, 291 N.Y. 125, 51 N.E.2d 674 (1943).^{7/}

The trust instrument is certainly not a model of clarity, but we do not think the trust was subject to revocation by petitioner. An analysis of the instrument, quoted in pertinent part above, shows that it

^{7/}

N.Y. Est., Powers & Trusts Law sec. 10-10.6 (McKinney 1967), formerly N.Y. Real Prop. Law sec. 145 (McKinney 1945), is as follows:

Where a creator reserves an unqualified power of revocation, he remains the absolute owner of the property disposed of so far as the rights of his creditors or purchasers are concerned. L.1966, c.952, eff. Sept. 1, 1967.

[- 17 -]

placed the entrusted funds beyond the control of petitioner until the enumerated claims were settled. Paragraph 2 of the instrument states that the funds were to be held by the trustee for the "sole purpose" of the payment of petitioner's obligations in the pending suits by named claimants instituted in connection with the two construction jobs. Those claimants became beneficiaries of the trust, and petitioner became a contingent remainderman, entitled to the balance remaining after the disposition of the claims.

To make the purpose of the trust even more explicit, paragraph 3 authorized the trustee to make payments "required to satisfy and discharge the obligation and responsibility" of petitioner to the plaintiffs in such litigation. No other payments from the trust fund were authorized. Paragraph 4 provided that a request by petitioner for the issuance of a check or checks payable to a claimant would be sufficient to empower the trustee to make such a payment. Significantly, this authorization refers only to payments to a claimant, i.e., a beneficiary of the trust.

Paragraph 5, on which respondent relies to contend that the trust was revocable, merely provided that the trustee would deliver to petitioner "the balance of the fund remaining after the disposition of the claims." The mechanics for the release of the funds "after the disposition of the claims" was a statement by petitioner that all claims had been "determined and disposed of." As contingent remainderman, petitioner, then and only then, would be entitled to the balance remaining in the fund.

Paragraph 7 does not relieve the trustee of any obligation to look behind any statement presented to it by petitioner, as contended by respondent, but refers rather to a request "believed by it [the trustee] to be genuine and to have been signed or presented by the suitor," i.e., a claimant.^{8/} Indeed, the reference in paragraph 8 to "action taken by it [the trustee]

^{8/}

Par. 7 is ambiguous, but the reference to the signature of a suitor clearly forecloses respondent's argument that the paragraph relieves the trustee of the necessity of looking behind any statement presented by petitioner. The paragraph may have been intended to deal with conflicting claims by the several beneficiary-claimants in case the deposited funds were not adequate to pay the full amount of the judgments awarded.

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in good faith and believed by it to be authorized" contemplated that it would consult its own counsel on the payment of the funds and on other problems related to the administration of the trust.

Thus, the only ways in which petitioner could have influenced the handling of the entrusted funds were to request the trustee to make a payment to a claimant-beneficiary, thus carrying out the purpose of the transfer, and to request that the balance be returned after the disposition of the claims, i.e., after the objective of the trust had been accomplished. In administering the trust, the trustee, subject to the supervision of a local court with equity powers, had the normal duties of independent judgment and inquiry, Mills v. Bluestein, 275 N.Y. 317, 323, 324, 9 N.E.2d 944, 946 (1937); inflexible loyalty to all the beneficiaries, In re Bond & Mortgage Guarantee Co., 303 N.Y. 423, 103 N.E.2d 721 (1952); and complete neutrality in protecting the respective interests of the claimants as beneficiaries and of petitioner as contingent remainderman, N.Y. Est., Powers & Trusts Law sec. 11-2.1(a) (McKinney 1967), formerly N.Y. Pers.

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Prop. Law sec. 27-a (McKinney Supp. 1965). In no way could petitioner have reacquired or otherwise controlled the entrusted funds until the purpose of the trust had been achieved. We think petitioner made a genuine transfer of the funds beyond its control within the meaning of section 461(f)(2) as interpreted by section 1.461-2(c)(1), Income Tax Regs., quoted in the margin.

Respondent's second argument is based on that portion of regulations section 1.461-2(c)(1) which states that a taxpayer may provide for the satisfaction of an asserted liability by transferring money or other property beyond his control to an escrowee or trustee pursuant to a written agreement "(among the escrowee or trustee, the taxpayer, and the person who is asserting the liability)." Since the several claimant-beneficiaries did not sign the trust agreement, respondent contends that the agreement does not comply with the regulations and will not support the claimed deduction. Petitioner argues that the regulation, so applied, is impractical,^{9/} unreasonable, and

^{9/}

In his opening statement, petitioner's counsel forcefully stated the practical considerations in these words:

(Continued)

invalid in that it adds restrictions and conditions to the statute.

We agree with petitioner that the claimant-beneficiaries' failure to sign the agreement does not disqualify petitioner for the deduction. However, petitioner's position is too broad. The regulation need not be declared invalid. Properly interpreted, the regulation simply does not require the signatures of the claimant-beneficiaries in this case.

Initially, it is pertinent that section 461(f) allows the deduction where, among other things, "the taxpayer transfers money or other property to provide

Footnote 9 - continued

it is completely unreasonable, in an adversary proceeding, to have the claimant a party to that agreement; to have the plaintiff know that there is \$1,100,000.00 waiting for it if it can obtain or make a settlement. The probability of collection is always a factor in any settlement that's negotiated in actions of this type. * * *

From the standpoint of claimants, it may be equally impractical to require them to sign such an agreement lest they thereby implicitly limit their claims at the outset of the litigation to the entrusted amount, which may represent only a fraction of their total claims (e.g., \$1,100,000 compared with \$14,781,150 in this case).

for the satisfaction of the asserted liability." Nothing in this language or its legislative history (S. Rept. No. 830, supra, 1964-1 (Part 2) C.B. at 604-605 and (Part 2) 745-748) suggests that the person asserting the liability need sign the transfer agreement.

A trust may be created even though the beneficiary has no knowledge of its creation and has not accepted its benefits. Rarely does a beneficiary sign a trust agreement, and his signature or the lack thereof does not affect the trust's validity. In the case of In re Prudence Co., 24 F.Supp. 666 (E.D. N.Y. 1938), a company, prior to the 1933 "Banking Holiday," sold "Prudence-Bonds" on weekly or monthly installments, and when the purchaser had paid a required amount a bond would be issued. The company, without notifying the purchasers, segregated the installment moneys paid toward the purchase of the bonds for which the payments had not been completed. Holding that the company held the segregated funds as trustee for the creditor-purchasers, even though they did not know of the segregated funds, the court said (p. 668):

Whether this account is to be treated as a special fund for the benefit of the subscribers or is to be treated as part of the general assets of the debtor, depends upon the effect to be given to the unilateral segregation of the funds in a special account when viewed in the light of all the circumstances. The creation of a trust requires no fixed form or phrase. The failure to notify the cestui que trust of the creation of the special interest in his favor, does not prevent the creation of a trust. Steel Cities Chemical Co. v. Virginia-Carolina Chemical Co., 2 Cir., 7 F.2d 280; Sinclair Cuba Oil Co., S. A., v. Manati Sugar Co., 2 F.Supp. 240, D.C.S. D.N.Y.; Rogers Locomotive & Machine Works v. Kelley, 88 N.Y. 234, 235; see Beaver Board Cos. v. Imbrie, 2 Cir., 296 F. 670, 672; 1 Bogert, Trust and Trustees (1935) § 172, p. 502. * * * [Emphasis added.] [10/]

Accordingly, the failure of the claimant-beneficiaries to sign the trust agreement did not prevent the creation of a valid trust or add any rights to petitioner as grantor or as contingent remainderman. Upon the

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To these citations on the lack of the necessity to notify the beneficiaries of the creation of a trust may be added numerous others, e.g.: Woodside Presbyterian Church v. Burden, 269 N.Y.Supp. 682, 687-688, 240 App. Div. 43 (1934), appeal dismissed 264 N.Y. 690, 191 N.E. 629 (1934); In re Sweeney's Estate, 279 N.Y. Supp. 927, 930, 155 Misc. 461 (1935); 1 Restatement (2d), Trusts, sec. 36a (1959); 1 Scott, Trusts, sec. 36 (3d ed. 1967).

creation of the trust, the Manufacturers Hanover Trust Company, as trustee, became obligated to effectuate the purpose of the trust--the payment of the claims against petitioner. N.Y. Est., Powers & Trusts Law sec. 11-2.1 (McKinney 1967), formerly N.Y. Pers. Prop. Law sec. 105 (McKinney Supp. 1965).

Thus, neither section 461(f)(2) nor its legislative history reflects any congressional intent to require a trust agreement executed for the purposes of that section to be signed by the beneficiaries.^{11/}

^{11/}

While sec. 461(f) is addressed to the problem of the deductibility of contested liabilities rather than to the rights of the taxpayer's creditors, we note that in the instant case, protection of the rights of the claimant-beneficiaries who were to be paid from the trust fund was not affected by their apparent lack of knowledge of the trust's creation. As a practical matter, had judgments been entered ultimately for the plaintiffs, petitioner almost certainly then would have disclosed the trust fund rather than allow a levy to be made on its other property for the payment of those judgments. Under such circumstances, if existence of the trust had not been disclosed voluntarily, petitioner's officers would have been subject to examination as to petitioner's assets, N.Y. Civ. Prac. Law sec. 5223 (McKinney 1963), and the trust fund's creation would have been revealed. On learning of the trust, the claimant-beneficiaries would have been entitled to demand of the trustee all information about the trust and its creation for which they had any reasonable use. Bogert, Trusts and Trustees, sec. 961 (2d ed. 1962); 1 Restatement (2d), Trusts, sec. 173 (1959). This would include an inspection of the trust agreement. Davidson v. Blaustein, 247 F.Supp. 225, 227-228 (D. Md. 1965).

Indeed, the disputed regulation itself says nothing about the signatures of the beneficiaries of a trust. As a matter of practice, a trust agreement is rarely signed by a beneficiary. The trust agreement in this case, signed only by petitioner and the trustee, created rights in the claimant-beneficiaries which were exactly the same as they would have been had the beneficiaries signed the instrument. The trustee had the same fiduciary duties and obligations to protect the rights of the claimant-beneficiaries, and the claimant-beneficiaries had the same remedies. Similarly, the rights of petitioner as grantor and contingent remainderman were exactly the same.

In these circumstances, the trust agreement was "among the * * * trustee, the taxpayer, and the person[s] who * * * [were] asserting the liability" to the same extent as it would have been had the claimant-beneficiaries signed the instrument. The imprecise language of the regulation--that the agreement is to be "among" the stated parties--was no doubt adopted in order to include situations like this one where the signatures of the claimant-beneficiaries would add nothing.

We hold that the trust agreement complies with the provisions of section 461(f) and of section 1.461-2(c)(1), Income Tax Regs. Allowance of the deduction will serve the congressional objective of matching deductions with taxable receipts to the extent practicable.^{12/} To reflect the disposition of other issues,

Decision will be entered
under Rule 155.

Reviewed by the Court.

12/

While petitioner ultimately prevailed in the underlying litigation, the question of accrual must be viewed as of the date of the transfer. As noted in the text, there is no suggestion that the transfer in trust was not made in good faith or that it did not reflect a realistic appraisal of petitioner's exposure to liability in the year in which its related earnings became taxable.

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FORRESTER, J., concurring: I concur in the result reached by the majority, but think the here critical portion of regulations section 1.461-2(c)(1) should be declared invalid if it is read as requiring the claimant-beneficiary to sign the written agreement.

The Code requires taxpayer to transfer money or property against the asserted liability, and the regulation quite properly requires it placed beyond taxpayer's control by a written agreement. But requiring the signature of the claimant adds nothing to taxpayer's loss of control and at the same time destroys, or at least limits and narrows, his rights as remainderman. He is forced into the unnatural posture of admitting and defining his adversary's strength during negotiations with him, thus limiting taxpayer's field for maneuver.

The Code does not require this penalty. If the regulation does it is invalid.

FAY, STERRETT, GOFFE, and WILES, JJ., agree with this concurring opinion.

HALL, J. I respectfully dissent. The "transfer" in this case did not meet the literal requirements of Treasury Regulation Section 1.461-2(c)(1) that a qualifying transfer under Section 461(f)(2) must either be made "(i) to the person who is asserting the liability," or "(ii) to an escrowee or trustee pursuant to a written agreement (among the escrowee or trustee, the taxpayer, and the person who is asserting the liability) * * *." (Emphasis added.) The "transfer" therefore cannot qualify unless, as the majority holds, the Regulation's requirement was a mere inadvertence or imprecision upon which the Commissioner may not rely, or unless, as Judge Forrester's concurring opinion finds, the Regulation is invalid. Being unable to agree with either of these views, I would sustain the deficiency.

As I read the Regulation, the Treasury has deliberately construed the statute to prevent a secret trust from qualifying. A trust is usually created by agreement between trustor and trustee. The unusual requirement here of the beneficiary's participation is, I believe, of great policy significance and was no mere inadvertence.

In fact, the requirement of participation by the other party to the litigation in a qualifying Section 461(f) transfer was even more clearly spelled out

in the Proposed Regulation :

A taxpayer may provide for the satisfaction of an asserted liability by transferring money or other property to the person who is asserting the liability, or with the agreement of such person to an escrowee or trustee to deliver the money or other property in accordance with the settlement of the contest, provided that the money or other property is transferred beyond the control of the taxpayer. [29 Fed. Reg. 9798, 9800 (1964) (Emphasis added).]

The Commissioner, unfortunately, raised a false issue by contesting this case on the ground that the entrusted funds were not transferred "beyond the control" of the petitioner. If that were all

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that the Regulation required, I would join the majority opinion. I do not doubt that the taxpayer created a valid trust, or that it placed the assets within the trustee's control pursuant to the terms of the trust instrument. But by no legitimate stretch of syntactical interpretation could there be an agreement among three parties which was unknown to one of the three.

Nor am I able to find the Regulation invalid. The statute requires a "transfer". That this was not intended to be read entirely literally as covering any kind of transfer, however, is made clear by the Committee Report, which reads as follows:

A taxpayer may provide for the satisfaction of an asserted liability by transferring money or other property to the person who is asserting the liability, or by a transfer to an escrow agent provided that the money or other property is beyond the control of the taxpayer. However, purchasing a bond to guarantee payment of the asserted liability, an entry on the taxpayer's books of account, or a transfer to an account which is within the control of the taxpayer is not a transfer to provide for the satisfaction of an asserted liability.

S. Rept. No. 830, 88th Cong., 2d Sess., 1964-1 C.B.
(Part 2) 746.

The statute and Committee Report make clear that a transfer to the opponent or to an escrow agent will qualify

if the property leaves the the taxpayer's control. An escrow, of course, presumes two parties with adverse interests as well as a third party escrow-holder, so that the litigation opponent, inferentially, would at least be aware of any escrow arrangement. The Committee Report does not, however, appear to anticipate the precise issue raised here--the secret trust in which the taxpayer seeks the benefit of the special deduction without the litigation disadvantage of disclosing his hand to the other party. The Regulations do not permit the taxpayer seeking the solace of Section 461(f) thus to have it both ways. In my view this construction does not overreach. In the first place, the legislative history, adequately set out in the majority opinion, and the Consolidated Edison case, clearly involved only arrangements known to both parties to the litigation. The secret trust was not adverted to by Congress. Secondly, the apparent lack of explicit congressional familiarity with such a device in a litigation context should be no surprise. There would normally be only one motive, a tax motive, to set up a secret trust. A defendant has too little brotherly solicitude for his opponent to be gratuitously setting up secret trusts for the plaintiff's benefit. Instead of

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arising in the normal litigation context which Congress adverted to in enacting Section 461(f), the secret trust in the present context is spawned by Section 461(f) itself. It is a rare sport, not to be found in nature. It is simply an effort to enjoy the deduction without the effects on one's litigation posture of disclosure. And since virtually any large company is constantly and increasingly beset as defendant with a swarm of lawsuits of varying degrees of merit, the majority's rejection of the Regulation's deliberately established prerequisites of the litigation opponent's knowledge and participation in a Section 461(f) arrangement opens the door to large-scale avoidance. Deductions will now be subject to being manufactured and timed to please, by the simple expedient of setting aside in secret trusts the amount sought to be deducted, as long as that doesn't exceed the maximum allowable litigation exposure. Little genuine change of business posture is involved, for if the litigation is won, the money will return; if lost the judgment must be paid anyway; in the meantime the secret trustor can enjoy the income, and the litigation opponent is none the wiser. Nothing in the legislative history suggests that Congress intended to establish any such regime, nor does it seem

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likely that it would have intentionally so legislated. We should resolve doubts in favor of the validity of Treasury Regulations. Commissioner v. South Texas Lumber Co., 333 U.S. 496 (1948). I cannot, under the circumstances, find the Treasury remiss in blocking this avenue to facile avoidance.

Section 461(f) was designed to alleviate a hardship created by a taxpayer who under pressure of litigation was forced to lay out cash before becoming entitled to a deduction. It was designed to meet bona fide exigencies of business litigation. The issue facing the Treasury in drafting its Regulations was whether the statute should also be construed to permit a taxpayer to thrust himself artificially within its protection through a formalistically perfect arrangement designed for no apparent purpose except qualifying for the deduction, while avoiding the collateral litigation consequences of disclosure to the opponent. I cannot find it beyond the regulatory power for Treasury to decide that such an arrangement would be "an operation having no business or corporate purpose" and to find that "the transaction upon its face lies outside the plain intent of the statute." Gregory v. Helvering, 293 U.S. 465, 469, 470 (1935).

RAUM, SIMPSON, and QUEALY, JJ., agree with this dissent.

UNITED STATES TAX COURT

POIRIER & McLANE CORPORATION,)	
)	
Petitioner,)	
)	
v.)	Docket No. 2662-72
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent.)	

DECISION

Pursuant to the opinion of the Court filed March 10, 1975, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

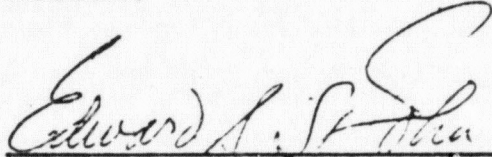
ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year 1964 in the amount of \$74,485.00.

(Signed) C. Moxley Featherston

Judge.

Entered: SEP 9 1975

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the respondent's computation, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein.



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AUG 28 1975

CERTIFICATE OF SERVICE

It is hereby certified that service of this appendix has been made on opposing counsel by mailing four copies thereof on this 3rd day of May, 1976, in an envelope, with postage prepaid, properly addressed to them as follows:

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